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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 59

A. J. SIMLER, *Petitioner*,

v.

LESLIE L. CONNER, *Respondent*.

On Writ of Certiorari to the Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinions of the Court of Appeals for the 10th Circuit are reported at 282 F. 2d 382 (1960) and 295 F. 2d 534 (1962).

JURISDICTION

Jurisdiction of this Court rests on 28 U.S.C. 1254(1). The petition for certiorari was granted by this Court on January 15, 1962, 82 S. Ct. 440.

STATEMENT OF THE CASE

A. J. Simler, petitioner herein, retained Leslie L. Conner, an attorney and respondent herein, to contest a will under which Simler had been bequeathed "the sum of $1.00" by his sister. The two executed a letter contract on July 18, 1952, setting out various terms of their attorney-client relationship and providing, in part, for payment to Conner and his firm of "a reasonable attorneys fee. . . ." Two months later, after some preliminary work and investigation by Conner, the two parties executed a second instrument, providing in relevant part:

". . . I agree that the reasonable fee is:

25% of the amount recovered if settled without trial.

33⅓% of the amount recovered if the case is tried in County and District Court.

50% of the amount recovered if the case is appealed to the Supreme Court.

I understand that all expenses, taxes, and costs are to be deducted first.

This is a contingent fee and if nothing is recovered, no fee is to be paid.

If anything is recovered or settled, I agree to pay you the above fees.

Yours truly,

/s/ A. J. SIMLER
A. J. Simler."

The quoted instrument, or letter, was signed by Simler in Conner's Oklahoma City, Oklahoma office.

with Mr. Arnold Britton, a legal associate of Conner, also present.

In the performance of his responsibilities, Conner (and other attorneys sometimes retained by him for particular jobs) litigated on Simler's behalf in an Oklahoma county court, intermediate court and Supreme Court; and personally conducted a federal action lasting from October 14, 1952 through May of 1957. The major result of his labors was that the Oklahoma County Court awarded Simler title by intestate succession to an Oklahoma farm, Conner having successfully contended before it that the named devisee under the sister's will was ineligible.

In 1958 Simler filed a declaratory action in the federal district court for the western district of Oklahoma, on diversity jurisdiction, seeking a judicial declaration as to the extent of his liabilities under his contract with Conner, if any, beyond what amounts he had already paid. Defendant Conner counterclaimed for an undivided one-half interest in the Oklahoma farm, on the theory that this represented "50% of the amount recovered" as contemplated by the September 25 letter above. Later, Conner moved for summary judgment pursuant to Federal Rule 56. After conducting three hearings on this motion and examining various depositions, pre-trial admissions and affidavits, (collected in the Appendix to this brief) the trial judge granted the motion.

From this decision a somewhat tortuous pattern of appellate litigation ensued.

First, Simler appealed to the Court of Appeals for the 10th Circuit, which reversed the trial court decision, seemingly on the ground that Oklahoma law dictated

a jury trial on the question of whether there was fraud in execution of the September 25 letter.[1] Conner then petitioned the Supreme Court for review of the 10th Circuit opinion by writ of certiorari. Initially denied, the petition was later granted on rehearing. The Supreme Court summarily remanded the case to the 10th Circuit for reconsideration in light of *Southard* v. *MacDonald* (Okla.) 360 P. 2d 940 (1961), a recent decision by the Oklahoma Supreme Court. On remand, the 10th Circuit reversed its earlier opinion on the strength of *Southard*, which held that Oklahoma law afforded no right of jury trial to a litigant seeking to set aside an attorney's contingent-fee contract, as a prerequisite to determining *quantum meruit* liability of the client. Characterizing the action below as of the same class, the 10th Circuit decided in obeisance to state law.

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[1] In analyzing state law, the Court stated:

"A fair analysis of the decisions of Supreme Court of Oklahoma establishes that court recognizes and follows the general rule that a contract for compensation of an attorney . . . is valid and enforceable if executed freely, voluntarily and with full understanding of the client. The voluminous record in this case indicates, the vast amount of labor, skill and time spent by the attorneys in connection with different cases which reached the appelate courts of the State of Oklahoma and the federal judicial system. We do not intend to minimize the value of these services or to say that the contingent fees provided for in the September 25th letter are unreasonable, but we are convinced that under well established principles of law in Oklahoma, the case should have been submitted to a jury on the question of whether the September . . . contract was fair, just and equitable and free from fraud." 282 F. 2d 386.

Thereafter, Simler filed a petition for certiorari with this Court, which was granted on January 15, 1962. In the petition Simler asserted that the question presented for review was:

> "Should the question of right to trial by jury be determined by the Federal Rules of Civil Procedure and the Laws and Constitution of the United States in a diversity case, or should such right be determined by the law of the State in which the case is being tried?"

It is this petition that is now at bar for this Court's consideration.

INTRODUCTION AND SUMMARY OF ARGUMENT

In reading petitioner's brief, Respondent feels somewhat akin to Thomas Paine when confronted with Edmund Burke's Reflections on the French Revolution, a work the former later described as a "pathless wilderness of rhapsodies." Rather like a galaxy of tangents, the diverse arguments heaped together in the brief have lead respondent to an earnest bewilderment, though attempting with the utmost seriousness to follow them. Because of this, Respondent feels compelled to jettison traditional form and put his argument in proper perspective by a few prefactory remarks.

It is axiomatic that without disputed issues of fact there is no basis for a jury trial. Since in such cases as the present one it is of first importance to understand what is *not* in dispute, Respondent wishes to delineate quickly the *conceivable* "issues" below and explain why two of these may be immediately winnowed from this Court's consideration. When distilled, Petitioner's voluminous pleadings yield only three conceivable "issues" of fact which might have

undercut the propriety of summary judgment or have necessitated a jury trial. These are:

1. Overreaching or fraud in the execution of the September instrument, *i.e.*, fraudulent inducement of Simler's signature thereto. 2. No intention by Simler to be bound by the words of the September instrument, or to regard it as ancillary to the July agreement. 3. The reasonableness of the 50% fee, quite apart from fraudulent execution of the instrument.

Potential issues (2) and (3) are quickly disposed of. Having admitted his execution of the September paper and its contents as plead by Conner, Simler could not raise a fact issue by a plea that he did not "intend" to be bound by the words as written or to treat the September instrument as ancillary to the earlier July agreement. Construction of the instrument was naturally a task for the court. *Seira* v. *Brewers' Refrig. Machine Co.*, 141 U.S. 510, 517 (1891); *Levy* v. *Gadsby*, 3 Cranch 180 (1805); *Gray* v. *Brunetti Const. Co.*, 266 F. 2d 809 (3d Cir. 1959). There can be no doubt that the language fairly supported the conclusion that it obligated Simler to pay Conner 50 percent of whatever Simler recovered as a result of his attorney's efforts. Fifty percent of this recovery—it is nowhere disputed—translated into an undivided one-half interest in the Oklahoma farm. Simler was therefore foreclosed from raising any fact issue by the bald assertion that he did not "intend" to be bound by the words as written, or to treat the September instrument as ancillary to, and an amplification of, the earlier June agreement. This is true because such pleas could not, as a matter of law, constitute a defense to the unambiguous language of the instrument once the latter was conceded to have been executed. A

mere subjective reservation, or unwillingness to be "bound" by such an instrument, is, under the most fundamental principles of contract law, not a legal defense at all. A defense that is bad as a matter of substantive law could not possibly have raised any factual issues.

As to potential issue (3), the first and most important consideration is that it is grounded upon an assumption that internal Oklahoma law affirmatively outlaws attorney-client fees that are more than "reasonable," notwithstanding they are prescribed in an otherwise lawful contract. Such an assumption is nowhere asserted or proved by petitioner, either below or in its brief before this Court. In any event, the recent decision of *Southard* v. *MacDonald*, *supra*, makes it plain that such an assumption is *not* the substantive law of Oklahoma. The only precedent Respondent could cite for its underlying premise is *Haunstein* v. *McAlister*, 172 Okl. 613, 46 P. 2d 552. But, in the subsequent *Southard* opinion the Oklahoma Supreme Court stated: "Since we hold that the deed and attorney-client contract are binding, there is no necessity to discuss the value of the service on *quantum meruit*." In a separate concurrence to the 10th Circuit's dismissal of the instant case on reconsideration, Judge Lewis stated quite clearly that *Southard* had overruled *Haunstein*, observing "... the opinion ... in Southard indicates that there is *no factual element of reasonableness* necessarily inherent in the searching scrutiny required in determining the validity of a contingent fee contract made between attorney and client...." (Emphasis supplied) 295 F. 2d 535.

This leaves only potential issue (1), and this, indeed, is the heart of the case so far as legal questions now

confronting this Court are concerned. Respondent's position is that Petitioner was not entitled to jury trial below on the alleged issue of fraud or overreaching in the execution of the September instrument. For this there are two distinct reasons. The first is that summary judgment, being a permissible practice in diversity cases even if the forum state lacks a counterpart, was properly implemented below. While the cry of "fraud" in the pleadings below could be said to have framed an issue in the abstract, it proved to be no more than a sham in fact. One of the more salutary results of the summary judgment practice under Rule 56 is to pierce such feigned issues. The second reason is that, regardless of whether the plea of "fraudulent inducement" was a sham, Petitioner nowhere asserted the kind of claim before the trial court that gives rise to a jury trial right under the Seventh Amendment. The Amendment assures such jury trial rights only to those claims which enjoyed similar rights at common law in 1791, when the Amendment was adopted. Simler's claim, as it stood before Conner's counterclaim, had no counterpart at common law, hence was not triable to a jury as of right. Simler's claim, after he had responded to the counterclaim, was for the reformation or cancellation of the September instrument. Actions to reform or set aside written instruments or contracts are traditionally equitable, both in federal courts and in most state courts, and thus include no right of jury trial. See 9 *Am. Jur.* §§ 4, 6; 5 Moore, Fed. Practice & Procedure 183 and cases there cited.

* * *

Petitioner evidently wants this Court to decide the large question of whether the Seventh Amendment of the United States Constitution secures a right of jury trial to litigants in diversity cases notwithstanding the

Erie-Guaranty doctrine. A logically prior question, however, is whether the summary judgment award by the district court was proper and, correlatively, whether federal or state law sets the standards by which a federal judge, sitting in diversity, rules on motions for summary judgment. This is a particularly appealing question in the instant case because Oklahoma has no summary judgment rule analogous to that in Federal practice. If this Court were persuaded that the summary judgment below was justified—on whichever standards were held applicable—then the Seventh Amendment question would not arise.

Because this Court has repeatedly emphasized its desire to avoid Constitutional questions if fairly possible, *Alabama State Fed. of Labor* v. *McAdory*, 325 U.S. 450 (1945); *C.I.R.* v. *Wheeler*, 324 U.S. 542 (1945); *Arkansas Louisiana Gas Co.* v. *Dept. of Public Utilities*, 304 U.S. 61 (1938); *Hoyal* v. *Kansas*, 258 U.S. 181 (1922); *Arkansas Fuel Oil Co.* v. *Louisiana ex rel. Maxlow*, 304 U.S. 197 (1938); *Cummings* v. *Merchants' Nat. Bank of Toledo*, 101 U.S. 153 (1880), respondent assumes it would welcome a course of Constitutional avoidance in the instant case. Accordingly, respondent chooses to discuss first the non-constitutional ground on which the present action can be disposed, then the Seventh Amendment question.

ARGUMENT

I. THE FEDERAL SUMMARY JUDGMENT RULE IS APPLICABLE IN DIVERSITY CASES ACCORDING TO "FEDERAL" STANDARDS REGARDLESS OF STATE LAW, AND WAS PROPERLY APPLIED BELOW.

A. Summary Judgment Is Permissible in Diversity Cases Under the Federal Rules, Regardless of Whether the Forum State Allows a Similar Practice.

Since 1938 it has been settled that in diversity cases federal courts must look to the forum state for applicable substantive law and to federal standards for matters of procedure. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). In 1945 this court, when deciding *Guaranty Trust Co. of N. Y.* v. *York*, 326 U.S. 99, 109 (1945), added a gloss to the *Erie* doctrine. Speaking through Justice Frankfurter, the Court there remarked that in federal courts adjudicating diversity cases "The outcome of the litigation . . . should be substantially the same, so far as legal rules determine the outcome . . . as it would be if tried in a State Court." Thus was minted the oft-quoted "outcome determinative" standard for use in diversity cases. *Cf. Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198 (1956); *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, (1949).

Respondent's position here is that implementation of Rule 56 in diversity cases does not run afoul of the outcome-determinative test; but, alternatively, that if it should be taken to do so, use of the rule would nonetheless be perfectly justifiable, in light of *Byrd* v. *Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958), because of affirmative federal policies in favor of such a course.

Though the summary judgment procedure is unknown to internal Oklahoma law, it is an integral part of federal practice. Rule 56 was promulgated in 1938, pursuant to the Federal Rules enacting Act of 1934.

and was thus binding by law upon all federal courts? It empowers a trial judge, on motion, to grant summary judgment for a litigant where there are no substantial issues of fact in dispute. The rule reflects a policy of expeditious judicial administration to the extent compatible with due process and fair treatment of the parties.

The rule should certainly be as usable in diversity cases as in those grounded upon other jurisdictional bases. The *Erie-Guaranty* doctrine should make no difference. For this conclusion there are several sound reasons.

To begin with the most obvious, the division of function as between judge and jury has traditionally been considered a "procedural" matter in American law generally. This is clearly true, for example, of conflicts of law decisions. *Ettlson v. Metropolitan Life Ins. Co.*, 137 F. 2d 62 (3d Cir. 1943) ("In conflict of laws cases the question whether an issue of fact is to be tried by a court or by a jury is considered one of procedure, and governed by the internal law of the forum"); Restatement, Conflict of Laws (1934) § 594; 3 Beale, Conflict of Laws (1935) § 594.1. It is as patently clear as anything in this troubled substantive versus procedural conflict can be, that rules bearing on how or before what agency a question is resolved are part of an overall mode of enforcing a right, but are readily distinguishable from the "right" itself. The summary judgment procedure, in turn, must surely be considered purely as part of the enforcement machinery of federal courts. It would perhaps be anomalous to regard it as anything but "procedural" inasmuch as the summary judgment practice is codified in the Federal Rules of Procedure, and the Rules Enabling Act "... was

purposely restricted in its operation to matters of pleading and court practice and procedure. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941). Moreover, in pronouncing Rule 56 a rule of "procedure" the Supreme Court merely followed the mainstream of Anglo-American jurisprudence. Summary judgment practice is but a variation of the same theme long sounded by the common law, which endorsed judgment *non obstante veredicto* and motions in arrest of judgment on a verdict where pleadings showed no material issue of fact requiring a trial or a verdict. *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 382 (1913) and cases there cited.

The summary judgment rule, then, is both functionally and traditionally a matter of "procedure" as distinguished from "substantive law." So much is beyond dispute. Granted this, can it yet be said that the rule must be excised from those applicable to federal diversity cases because it could substantially affect the outcome of some particular cases? The immediate answer to such a query is that any federal rule—even the local no-smoking rule—may contribute substantially toward the outcome in any given case. But there is a perfectly sensible reply available to the question without reducing the "outcome-determinative" test to an absurdity. The "outcome-determinative" test must be applied with an eye to reason and common sense. Viewing it as a rule of reason rather than one of logical absoluteness, it seems altogether proper for the federal summary judgment rule to fall outside the zone of the outcome-determinative test. In the instant case, for example, the granting of summary judgment appears every bit as appropriate as granting a directed verdict, as a state tribunal might very well have done. An ap-

praisal of the record indicates that a directed verdict would have been quite probable, had petitioner's witnesses actually testified in accordance with their depositions. (See appendix) In the circumstances of this *actual case*, at least it makes little sense to talk about the purely hypothetical difference in result that use of the federal rule might have made.

Beyond this, there are strong affirmative policies favoring use of the rule in diversity cases, even if it may sometimes affect results of cases. In *Byrd* v. *Blue Ridge Rural Elec. Co-op.* 356 U.S. 525 (1958) this court held that in trying a diversity negligence suit before a federal district court the employer's defense of statutory immunity had to be tried according to federal jury trial rules notwithstanding that the form state law required trial of such defenses before the court. This Court there squarely rejected the argument that the *Erie-Guaranty*, or "outcome-determinative" test must be mechanically applied simply because a diversity case was involved. It assigned two basic reasons: (1) the state rule requiring non-jury trial was not intimately bound up with the substantive defense itself and (2) the "affirmative countervailing considerations" of policy, notably the principle that the independent federal judiciary distributes trial functions between judge and jury under the influence of the Seventh Amendment. Both policies apply here. *Byrd* has since been read to mean that the "outcome-determinative" standard is not dispositive alone, but that a second question ever present is whether there are countervailing considerations "reflecting substantial federal policies which outweigh in the final balance the aim of like result." *Monarch Ins. Co. of Ohio* v. *Spach*, 281 F. 2d 401, 406 (5th Cir. 1960). In *Monarch*, where

the court held the federal rule on admissibility of evidence to prevail over a contrary state statute, the Fifth Circuit found just such a federal "countervailing policy consideration in the *Blue Ridge* sense," it said, "in" the historic purposes of the Federal Rules and the forces which led Congress to pass the Rules Enabling Act. The broad aim, especially in fields of practice, was to reverse the philosophy of conformity to local state procedure and establish, with but few specific exceptions, an approach of uniformity within the whole federal judicial trial system." On much the same grounds, the First Circuit has upheld use of the Federal impleader practice of Rule 41 in a diversity case even though impleader was unknown to the forum state law. *D'Onofrio Const. Co.* v. *Recon Co.*, 255 F. 2d 904 (1st Cir. 1958).

The policy expressed in the Rules themselves is certainly an overriding policy in the instant case on the side of affirming the power of the district judge below to use Rule 56. To hold otherwise would mean that summary judgment could never be granted in a diversity case if the forum state's practice did not perfectly reflect that found in Rule 56, thus defeating the entire policy of federal conformity in procedural matters. It would overlook the argument that ": . . so long as Congress opens the national courts to cases 'between citizens of different States,' . . . it would seem that they are entitled to the essentials of a trial according to federal standards," *Partin* v. *Michaels Art Bronze Co.*, 202 F. 2d 541, 545 (3d Cir. 1953 concurring opinion).

Finally, if is of cardinal importance to note that if in this case a mechanistic "outcome-determinative" test prevails over the policies underlying one of the

important Federal Rules, it would portend inevitable inroads upon the rights of diversity litigants, in other cases, to such salutary "federal" procedures as the declaratory judgment, interpleader, impleader, forum non conveniens, etc. Ascribing such talismanic power to the "outcome-determinative" test would, in Judge Clark's phrase, "prove too much." *Jaftex Corp.* v. *Randolph Mills, Inc.*, 282 F. 2d 508, 513 (2d Cir. 1960).

For these reasons, Respondent thinks it plain that the soundest approach is that Rule 56 was quite properly employed in the case at bar by the federal district judge, either on the theory that its usage does not fail within the outcome determinative test or, if it does, that the affirmative federal policy underlying the rules generally and Rule 56 especially outweighs any competing policies.

B. Summary Judgment Was Properly Applied Below

Granted that Rule 56 is available to federal district courts in diversity cases on the same terms as in others, the only question outstanding is whether it was *properly* applied below. As to this, there can be little doubt.

The rule provides that summary judgment shall be granted on motion "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." That these conditions were fulfilled is best illustrated, of course, by an examination of the record below.

The only matter as to which there might conceivably have been a disputed issue of material fact was the execution of the September instrument. In sustaining

Respondent's motion for summary judgment, the trial court addressed itself squarely to this issue, stating "... there is no issue of fact concerning the circumstances under which the letter of September 25, 1952 came into existence ... and there is no evidence of fraud, overreaching or misconduct on the part of the defendant which would form any basis to set aside or disregard the letter as a part of the contract between the parties."

In addition, the trial judge conducted three separate hearings on the motion and, according to his order, "carefully reviewed and examined the depositions of plaintiff, defendant and others, the exhibits, transcripts, pre-trial admissions and the entire record in this cause, ..." What the Judge examined might understandably have led him to conclude that the issue of "fraud in the execution" had been feigned in the pleadings and was a sham rather than a genuine question. Of course, one of the more salutary functions of the summary judgment rule is to pierce sham pleadings and determine whether there is a real issue at all. *Suckow Borax Mines Consolidated* v. *Borax Consolidated*, 185 F. 2d 196, 205 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951). The federal courts may properly employ the rule to look through allegations of fraud in the execution or inducement of a written instrument. *Port of Palm Beach Dist.* v. *Goethals*, 104 F. 2d 706 (5th Cir. 1939). There is, further, no particular magic in the fact that a contingent fee was at stake below in a dispute between an attorney and client. While in the nature of things relatively infrequent, the recent case of *Gray* v. *Brunetti Const. Co.*, 266 F. 2d 809 (3d Cir. 1959), involving suit by an attorney on a contingent fee contract, was this type of case. After

testimony the court withdrew the case from the jury and chose to treat two earlier motions for directed
4 verdicts as motions for judgment. It granted the plaintiff's motion, having itself found that the contingent fee agreement was entered into with full disclosure and without "fraudulent or unfair conduct on the part of the attorney." In this the trial court was upheld by the Third Circuit. In this, it should be added, the decision mirrors quite accurately the situation before the trial court in the case now at bar.

As viewed by the Court below, there was evidently no genuine issue as to the execution of the September instrument. As to the surrounding circumstances, *e.g.*, age of Simler, setting in which the instrument was executed, conversation, terms of the instrument, *etc.*, there was no dispute between the parties. Whether these various data constituted "fraud" in the legal sense was an ultimate question for decision by the court, but the primary facts, on which such a decision had to be predicated, *were not in dispute at all.* In this sense the decision was analogous to *Walker v. U.S. Gypsum Co.*, 270 F. 2d 857 (4th Cir. 1959), where an ultimate issue was a plaintiff's "employment status," a matter necessarily a function of certain primary facts or data. Finding no dispute as to the latter, the Court granted summary judgment, observing that "[i]t certainly does not follow . . . that, if there is no issue of fact genuinely in dispute, the question of employment status must be submitted to a jury." (860).

Furthermore, Petitioner never brought forward evidence at any of the three hearings on the motion for summary judgment which could persuade the trial Judge that the framed issue was not actually a sham.

No doubt the bare allegation of "fraud" or "overreaching" framed a formal issue in the pleadings, but a signal objective of summary judgment procedure, Respondent reiterates, is to pierce such formal "issues" to see if they are real. Only if they are does the question of a jury trial right ever arise. No conceivable "issues" in the case below *were* real, in this sense. Accordingly, entry of summary judgment was altogether fitting and proper. On this basis this case can now be decided by this Court in Respondent's favor with no need—logical, moral or otherwise—to proceed further to decision of possible Seventh Amendment questions.

In the alternative, this Court could dismiss the petition for certiorari as having been improvidently granted, as it has done on rare occasions when an important question that at first appeared ripe for adjudication later turned out to be premature. *McCarthy* v. *Bruner*, 323 U.S. 673 (1944); *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387 (1923). *Cf.* also *United States* v. *Shannon*, 342 U.S. 288, 294-96 (1952) (opinion of Justice Frankfurter).

Respondent respectfully urges the Court to pursue one or the other of these alternative courses in the case at bar.

II. ASSUMING ARGUENDO THAT PETITIONER'S CLAIM TO A JURY TRIAL RIGHT UNDER THE SEVENTH AMENDMENT NEED BE CONSIDERED, THE SEVENTH AMENDMENT AFFORDED HIM NO SUCH RIGHT TO A JURY TRIAL BELOW BECAUSE HIS CLAIM IN THE DISTRICT COURT IS PROPERLY CHARACTERIZED AS "EQUITABLE" RATHER THAN "LEGAL."

In assessing a litigant's claim to a right of jury trial under the Seventh Amendment, certain fundamentals have long been established. The most basic is that the Amendment preserves intact just such right to a jury as obtained in the English common law of 1791, the date of the amendment's ratification. *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved [by the *Seventh Amendment*] *is the right which existed under* the English common law when the Amendment was adopted.") This constitutional protection extends only to such claims as were then deemed "legal" rather than "equitable" by the common law. *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); *Walker v. New Mexico & Southern Pac. R. Co.*, 165 U.S. 593 (1897); *Parsons v. Bedford*, 3 Pet. 433 (1830). Any given issue of fact may be either "legal" or "equitable" when viewed in the abstract. For the purpose of deciding whether a litigant enjoys a constitutional right to a jury, it is the nature of the claim asserted, rather than any particular issue of fact, which operates as a touchstone. When confronted with a claim, it is thus incumbent upon any federal court to appraise the claimant's pleadings and make a classification of his action as "legal" or "equitable."

In diversity cases, a threshold question would appear to be whether it is federal or state law that makes the characterization of "equitable" or "legal" for purposes of deciding whether a claimant has a Seventh

Amendment right to a jury trial. So far as Respondent is aware, this is a matter never yet squarely laid to rest by this Court. In Respondent's view, the better reasoned decisions by federal courts of appeal support the notion that federal rather than state law should control this characterization. *E.g., Ettelson* v. *Metropolitan Life Ins. Co.*, 137 F. 2d 62, 64-65 (3d Cir. 1943); *Diederich* v. *American News Co.*, 128 F. 2d 144 (10th Cir. 1942); *Bowie* v. *Sorrell*, 209 F. 2d 49 (4th Cir. 1953) ("We conclude that the right to jury or court trial in the federal courts has been and should continue to be solely one of federal practice."); *Hollingsworth* v. *Gen'l Petroleum Corp.*, 26 F. Supp. 917 (D. Ore. 1939). Also on the side of this view is the very important fact that it alone would insure uniformity in the application of a Constitutional right, a consideration of great importance.

However this point may be resolved, it must be borne in mind that even if Oklahoma law were held applicable, it would not have secured to petitioner a right of jury trial. In *Southard* v. *MacDonald*, *supra*, the Oklahoma Supreme Court stated in its syllabus (which, by state practice, must state the law of the case:

> "Where it is necessary to cancel a contingent fee contract before any other relief prayed for can be granted, and the cancellation of such contract is the basic relief sought, neither party is entitled to a jury trial for the reason that the cancellation is a purely equitable matter."

After this Court had earlier remanded the present case to the 10th Circuit for reconsideration in light of *Southard*, the 10th Circuit held that the present case was analogous to *Southard*. They were akin, it held,

because the essence of each, by local characterization, was an action to set aside a contract preparatory to seeking other relief. This action is "equitable" under Oklahoma law. Realizing that this Court normally accepts as controlling the interpretation by a Court of Appeals of the state law within its circuit, *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949), any question of state law may now be laid aside. What follows, accordingly is Respondent's analysis of the Petitioner's action below, on the assumption that federal law makes the characterization for purposes of determining whether there was a constitutional right to a jury trial.

A. Petitioner's Original Complaint Below Was Equitable in Character

Viewed by itself, Simler's original complaint is exceedingly difficult to compress into any particular form of action existing in 1791. His prayer was that ". . . this Court adjudge whether or not this plaintiff is indebted to the defendant in any sum . . . and if so, to what extent or what amount. . . ." Essentially, he sued to determine the extent of his liability under an admittedly lawful contract of employment with an attorney. Such an action, Respondent submits, could not have been brought *at all* in the common law of 1791. This is so for at least two reasons. One is that no action lay at that date by which a barrister could enforce promises made to him in an attorney-client contract of employment. *Moor* v. *Row*, 1 Ch. Rep. 38; 6 Holdsworth, *A History of English Law* 440 (1937). Enforcement of a client's promises to a barrister not being of judicial cognizance, such promises were thus, strictly speaking, no more than moral obligations. Had a client asked an English common law court to deter-

mine his legal obligations under such a contract, therefore, he would have been seeking a judicial nonesuch. The second, and still more compelling reason is that the common law made no allowance for the kind of declaratory relief envisaged by the Declaratory Judgment Act of 1934, 28 U.S.C. §§ 2201, 2202. Simler's complaint, indeed, is the kind that could never have brought in any fashion, but for the Declaratory Judgment Act.

Since Simler's action could not have been brought in 1791, it follows that there was no jury right on that date for such an action. If the action enjoyed no common law right of jury trial then it accordingly enjoys no Constitutionally protected right of jury trial today. The mere fact that the Declaratory Judgment Act now provides federal courts with the jurisdiction to entertain cases of this type does not enlarge the historically derived Constitutional right of jury trial.

Of course, it frequently happens that litigants are empowered by statute to file actions which they could not have filed at common law. In such cases, a notable commentator has observed, ". . . the right of action should be analogized to its historical counterpart, at law or equity, for the purpose of determining whether there is a right of jury trial." 5 Moore, Fed. Practice & Procedure 125. The theory of this proposition, as ably expounded in *United States v. Jepson*, 90 F. Supp. 983, 986 (D. NJ 1950), is that ". . . when a federal statute embraces a common-law form of action, that action does not lose its identity merely because it finds itself enmeshed in a statute." Respondent does not necessarily cavil with this observation, nor does the analysis of the instant case do any violence to it.

This notion of "analogizing" for the sake of deciding Seventh Amendment claims has been followed typically, if not exclusively, in cases where a statute created a new substantive right but the enforcement machinery for the right fitted into an older mold, or "form of action." See, *e.g.*, *Fleming* v. *Peavy-Wilson Lumber Co.*, 38 F. Supp. 1001 (W.D. La. 1941); *Olearchick* v. *American Steel Foundries*, 73 F. Supp. 273, 280 (W.D. Pa. 1947); *cf.* also *Hepner* v. *United States*, 213 U.S. 103 (1909).

The "analogizing" doctrine, as here described, has not in terms received this Court's official approval. Whether Professor Moore's conception of it would conflict with the theory applied by Respondent to Simler's claims below is perhaps not perfectly clear. Respondent feels that there is no conflict, but assuming one, that precedents of this Court uphold Respondent's analysis of the actions now under review.

In a word, Respondent's position is that Simler's action, as filed in the district court, had *no* counterpart at common law, and hence no right of jury trial. It will not do, of course, to say the action was just an action on a contract, hence analogous to assumpsit or some other common law form of action on the "law" side. Such a too facile analysis overlooks the crucial fact that the type of action filed by Simler was affirmatively barred at common law. This is true both because, as noted above, an attempt to obtain accounting of one's liability to a barrister was not of judicial cognizance and because the common law in no case would afford declaratory relief. Analogies are altogether gratuitous in this case because the essential thrust of Simler's claim—what he actually sought to do—had no counterpart in the common law and was affirmatively barred.

In this sense, the present claim is akin to an effort to sue the sovereign. This was, of course, impossible at common law, but by statutory cession of jurisdiction it may now be accomplished in federal courts. But the fact that such suits now lie, by statutory grace, certainly does not create a Seventh Amendment right to jury trial in such cases. In *Galloway* v. *United States*, 319 U.S. 372 (1943), this Court so held, in reviewing a suit against the United States on a governmental war risk insurance policy. The Court noted there "... that the [Seventh] Amendment has no application of its own force to this case. The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign." 319 U.S. 388.

The principle of this decision was hardly novel. Much earlier the Court had said substantially the same thing in *Guthrie Nat'l Bank* v. *City of Guthrie*, 173 U.S. 528 (1899). There a territorial legislature had enacted a statute creating a special commission to pass on monetary claims against the city of Guthrie. In reversing a territorial court's holding that the statute was void, the Supreme Court held, *inter alia*, that the absence of jury trial procedures did not vitiate the legislation. It stated:

> "There is no force to the objection that in ascertaining the facts provision must be made for a trial by jury, if demanded, or else the Seventh Amendment . . . is violated. . . ."
>
> "This act does not infringe upon that amendment. The proceeding under it is not in the nature of a suit at common law. . . ." 173 U.S. 528, 537.

So also in the well-known case of *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301

U.S. 1 (1937). This Court held that the N.L.R.B. could properly render an order for payment of back wages even though administrative machinery, rather than a jury, was employed by it to make findings of fact. This decision is particularly relevant because the Court there squarely rejected the argument urged upon it that the award of back wages, being an order for monetary payment, should be analogized to a judgment for damages at common law. The analogy was inapposite, said the Court, because "[t]he proceeding is one unknown to the common law. It is a statutory proceeding. . . . The contention under the Seventh Amendment is without merit." 301 U.S. 1, 49.

The words just quoted apply with equal accuracy to the proceeding now under consideration. The complaint below was most emphatically not known to the common law. It is a statutory proceeding in the sense that it would not lie even today but that the Declaratory Judgment Act. Yet the Declaratory Judgment Act itself cannot somehow trigger into being a metaphysical "jury trial right" which could, as a matter of raw historical fact, never have been asserted in 1791.

Respondent's reasoning under this head can be capsuled in this fashion. If the kind of action brought below was barred by the common law, the action historically never had any right to jury trial at common law. By the "action" Respondent means, specifically, a request by a client for an adjudication of the amount of his obligations to his attorney under a lawful employment contract. Such a request would have been dismissed as an anomaly at common law because the courts did not issue advisory opinions and could not logically have been expected to adjudicate purely moral obligations. Such obligations are now legally enforce-

able rather than "moral," through the force of internal Oklahoma law. The federal district courts now have jurisdiction to entertain suits for declaratory relief, because of the Declaratory Judgment Act. For these reasons an "action" now lies that at common law did not. But has a Constitutional right to jury trial somehow been created in this process? Certainly not. This situation is not like that, say, of an employee's suit against his employer for unpaid wages. The legal obligation to pay these minimum wages was created by statute, to be sure, and such a duty did not exist at common law. But the action by which the employee seeks to enforce this new obligation sounds in debt or assumpsit. Similar duties at common law were enforced in exactly the same way, with a judgment being rendered for money damages. The particular right or duty is new; the mode of enforcement is not. In such instances the "analogies" above may be perfectly proper, though Respondent wishes to make no commitment either way. But the instant "action" was one involving neither a right *nor a* mode of enforcement accepted by the common law. It is precisely like the "action" against the soverign which at common law was a purely mythical one, both in the sense of a right and the enforcement machinery for that right. If no constitutional right attaches to suits brought against the sovereign today, none attaches to suits such as Simler brought below. Hence, a search for possible analogies to the instant "action" is not merely bootless but a positive mistake. To compound a jury trial "right" out of the instant circumstances is to create a Constitutional right out of whole cloth, and can only be accomplished by the alchemy of the bootstrap.

Still, if analogies must be attempted, Respondent points to the fact that Simler's complaint bears none

of the incidents of any common law action on the law side but only to those sounding in equity. His was not a damages suit, as would have been an action in debt or contract. He did not even ask for a determination of someone else's liability to him. He merely sought an adjudication of his own *amount* of liability to another, the *fact* of liability being freely conceded. If Respondent were compelled to suggest a suitable analogy, he would be hard pressed to do so. On balance, however, the common law form of action most nearly analogous to Simler's would appear to be that of account. This was, of course, an equitable action at common law and is so considered by federal courts for purposes of determining Seventh Amendment rights. *Johnson* v. *Gardner*, 179 F. 2d 114 (9th Cir. 1949); *Beregrici* v. *Chaplin*, 7 F.R.D. 61 (S.D. N.Y. 1946); *Williams* v. *Collier*, 32 F. Supp. 321 (E.D. Pa 1940). The major distinction between Simler's original claim and the common law conception of an accounting action is that Simler sought, so to speak, an accounting of *his* obligations to another, rather than the reverse.

The net of the argument so far, then, is that Simler's original claim, viewed unto itself, was an action with no counterpart at common law. The common law recognized neither the *right* nor the *mode* of enforcement here involved. Hence, with nothing to analogize to, no analogies need be sought to early forms of action. But if analogies are necessary, there is still none reasonably suited to Simler's claim save that of an accounting, which was equitable in character and enjoyed no jury trial right. Thus, it seems fair to say that Simler was entitled to no Constitutionally-protected jury trial below on the strength of his original claim alone.

B. Petitioner's Claim Below, Considering His Amended Pleadings in Light of Respondent's Counterclaim, Was Also Equitable in Character

After the filing of Simler's complaint and amended complaint, Conner filed an answer and counterclaim. (R. 6 *et seq.*) The counterclaim set up the September 25 instrument (R. 12) and asked for judgment thereon. Specifically, Conner sought judgment in his favor for an undivided one-half interest in the Caddo County farm which, by his lights, constituted the "50% of the amount recovered," as provided in the September paper. (R. 19) In reply to this counterclaim Simler filed a rather lengthy pleading. (R. 41-69)

Any hope Simler may have had to a jury trial right naturally turns on the nature of the claim he asserted, as the actual issues emerge from the proceedings below. *Damsky*, v. *Zavatt*, 289 F.2d 46, (2d Cir. (1961); *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corp.*, 124 F.2d 563, 566 (2d Cir. 1942); *Hargrove* v. *American Cent. Ins. Co.*, 125 F.2d 225, 228 (10th Cir. 1942). What then has been added to Simler's case?

As noted in the introduction *supra* three potential issues were generated by these responsive pleadings. For the reasons developed at pp. 6-7 herein the only one that can be of real concern here is the allegation of a fraudulent inducement of the September instrument. Assuming *arguendo* that this was not a sham "issue," it still readily appears that Simler's cause fares no better after his response to the counterclaim than before.

To allege that the September instrument was fraudulently induced was simply to assert that what, to all intents and purposes was an unambiguous contract, should not really be considered as such because there

was fraud in the execution thereof. This is the classic instance of an action to reform or set aside a contract or written instrument.[2] At English common law and under most state rules this is a typical, long-established equitable form of action carrying with it no right to a jury trial. 9 *Am. Jur.* §§ 4, 6; 5 Moore, Fed. Practice & Procedure 183. It is equally well established that "federal" law treats actions to set aside or reform contracts as "equitable" for the purpose of deciding a litigant's right to jury trial. *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203 (1937); *Liberty Mutual Ins. Co.* v. *Gerald*, 170 F.2d 917 (5th Cir. 1948) (action to set aside or cancel written compromise settlement, preparatory to enforcement of another claim); *City of Morgantown* v. *Royal Ins. Co.*, 169 F.2d 713, 714

[2] The same analysis, it might be noted, applies to the potential issue as to the "reasonableness" of the 50 percent award provided in the September instrument. Such an "issue" could not possibly arise until the September instrument had been set aside, otherwise the fifty per cent sum would control. It also bears mentioning that Respondent's analysis of both the "reasonableness" and "fraudulent inducement" issues, or potential issues, as constituting an action to set aside or reform a written instrument, hence equitable in nature and affording no jury trial right, does not conflict with the decision of this Court in *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959). This Court there held that it may in some cases be an abuse of discretion for a trial judge to order issues tried to the court before trying others to a jury, where certain essential questions are common to both. It does not touch the instant cases for two very clear reasons. The first is that there were no common questions as between a possible issue of "fraudulent inducement of the signature" and the "reasonableness" of the fee specified in the instrument. The second is that, even if there had been, Petitioner's "right" to a jury trial of the "reasonableness" matter—actually the be-all and end-all of his efforts at the trial—could never have come into existence *until* the court-triable issue of whether the writing was to be set aside as fraudulently induced had already been decided. The *Beacon* doctrine does not reach such purely contingent rights. See *Damsky* v. *Zavatt*, 289 F. 2d (2d Cir. 1961) at 56.

(4th Cir. 1948); *Garland* v. *Garland*, 165 F.2d 131 (10th Cir. 1947); *Edward B. Marks Music Corp.* v. *Wonnell*, 4 F.R.D. 146 (S.D. N.Y. 1944); 5 Moore, Federal Practice & Procedure 184.

In short, when viewed in light of his response to Conner's counterclaim, Simler's claim became one to cancel or set aside a written instrument or contract. The 10th Circuit in its second decision characterized the action in precisely this fashion. So, it appears, should this Court. So characterized, the action most emphatically did not entitle Simler to a jury trial.[3]

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[3] As a final note, in no way intended to be recriminatory, it bears mentioning that Petitioner's brief nowhere sets out any theory or analysis demonstrating why his claims below should fall within the rubric of "legal" rather than "equitable" actions. The burden of the brief seems to be simply to assert that the Seventh Amendment applies to cases brought before federal courts sitting in diversity. For all that appears, Petitioner stands on the idea that if it applies it automatically grants a right of jury trial, on demand, in all types of cases filed therein—a proposition that can only be described as a legal barbarism.

Respondent, of course, has never elected to argue that the Seventh Amendment is somehow inapplicable to federal courts when exercising their diversity jurisdiction. This Court's disposition on that point was adumbrated long ago by Justice Holmes, *Davis* v. *Wechsler*, 263 U.S. 23, 24 (1923). More recent decisions have indicated, either by implication or by strong dicta, that the Amendment does indeed apply. See *Byrd* v. *Blue Ridge*, *supra*; *Lyon* v. *Mutual Benefit Health and Accident Ass'n*, 305 U.S. 484, 489-90 (1939) and, most recently, *Atlantic & Gulf Stevedores* v. *Ellerman Lines*, 7 L.ed. 2d 798, 804 (1962).

Granted its applicability, the Seventh Amendment still assured Petitioner of no jury trial right in this case because his claim cannot fairly be defined as "legal" in character, applying the

CONCLUSION

For the foregoing reasons Respondent respectfully prays that the action by the Court of Appeals be affirmed; or, alternatively, that the petition for certiorari now be dismissed as having been improvidently granted.

Respectfully submitted.

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traditional standards by which the scope of Seventh Amendment protection is measured. Furthermore, even if Petitioner had made "legal" claims, the Seventh Amendment would have assured him of no right to a jury trial below because there were no material issues of fact and issuance of summary judgment was entirely proper.

APPENDIX

As observed in the brief, the District Court conducted three separate hearings before granting Respondent's motion for summary judgment. In addition, the trial judge had before him the depositions of both parties and Mr. Arnold Britton, the third person present when the September 25 instrument was executed. Pertinent excerpts are as follows:

1. From Mr. Conner's:

> A. I can't answer your question except that that is our contingent fee contract. All this letter of September 25th, 1952, does to the letter of July 18, 1952, is for him and I to determine what the word reasonable fee meant, and it inured just as much to his benefit as it did to mine. Now, another thing, another thing, Mr. Ogden, that might have brought this thing about, I had discussed this matter as I recall, with Mr. Grigsby, about employing him on a contingent fee contract in this case, and he said, 'How have you been employed?' And I showed him my July 18th employment, and I think that either he or Mr. Britton was talking about that we had better find out from Mr. Simler or agree with Mr. Simler what a reasonable fee would be, and that may be another thing that brought this thing about. (Original R. 711 et seq.)

2. From Mr. Simler's:

> The Witness: I signed it for one reason because they talked in such a manner that it would just be impossible for them to continue the case unless they got a stronger, more assured contract than they had before, that it was a reasonable contract and they didn't think that that was, in other words, sufficient for all the litigation they were going to have and at the same time they assured me that they had the will case by hiring Mr. Daugherty, that they had the will case finally froze up. Now, I don't say that they hired Mr. Daugherty at this time, but they did right shortly after that and he informed me that he was going to hire

some other lawyers, but he didn't tell me who they were, but he said he had a good will case man. (Original R. 860)

3. From Mr. Britton's:

Q. All right, sir. Now when you called Mr. Simler down on the 25th of September, 1952, was Mr. Grigsby there?

A. I don't remember.

Q. Well, when this letter was signed, you don't know who was there then?

A. Well, I am sure that I was there, and I am sure that Mr. Conner was there, but I don't remember for sure whether or not Mr. Grigsby was there.

Q. Would you tell the court and jury why you said to Mr. Conner and Mr. Conner to you Would you tell the court and jury what you said to Mr. Conner and Mr. Conner to you, and either one of you to Mr. Simler about this letter here dated the 25th of September, 1952, signed by Mr. Simler?

A. What was said to Mr. Simler?

Q. Yes.

A. Well, I think I have answered it once, but I will try to do it again.

Q. Well, I do not recall it, if you did.

A. That we just felt like because of the mass litigation that was going on and for the protection of every one concerned, both Mr. Simler and to Mr. Grigsby, Mr. Conner and myself, that the amount of the fee ought to be set out with particularity so that we would know where we were and that that was more or less a standard amount and we thought that it was a fair and reasonable fee, and I can't say to you that Mr. Simler was gleeful or enthusiastic about it, but the fact remains that he did sign it (Original R. 935-1)

Respondent also respectfully invites this Court's attention to the extended colloquy between the trial Judge and counsel for Petitioner below, reported in the printed record herein at pages 101-105. This reveals, perhaps better than anywhere else, both the fair mindedness of the trial court and the absence of any genuine issues of fact.